No. 3196

United States Circuit Court of Appeals

For the Ninth Circuit

JULIUS RUHBERG
Plaintiff in Error

vs.

THE UNITED STATES OF AMERICA
Defendant in Error

Brief for Plaintiff in Error

Upon Writ of Error to the United States District Court for the District of Oregon

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STATEMENT OF THE CASE.

By indictment returned March 1, 1918, into the United States District Court for the District of Oregon, Julius Ruhberg was charged in four counts with as many violations of Section 3 of the Act of Congress approved June 15, 1917, known and hereinafter referred to as the "Espionage Act." The

section in question at the time the offenses are charged to have been committed provided:

> "Whoever, when the United States is at war, shall wilfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and whoever when the United States is at war, shall wilfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall wilfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both."

Upon a plea of not guilty, the cause proceeded to a first trial begun April 24, 1918, which resulted in a dismissal by the Government of Count III of the indictment, after announcement by the court that a verdict of not guilty would be directed upon that count, and a disagreed jury and mis-trial upon the remaining counts of the indictment. A second trial, begun May 7, 1918, resulted in a verdict of conviction upon Count IV, and acquittal of the charges made in all remaining counts. This honorable court is therefore concerned with Count IV only of the indictment, which, summarized, charges that between June 1, 1917, and January 1, 1918, at particular dates unknown to the grand jury, but while a state of war existed between the United States

and Germany, Ruhberg, with intent to do so, did in Sherman County, Oregon, knowingly, wilfully, unlawfully and feloniously obstruct the recruiting and enlistment service of the United States, to the injury of the service, and the United States, by stating to or in the presence of William Mitchell and Luther Davis:

> 1. That the moneyed men had caused the United States to enter the war against Germany.
>
> 2. That Germany was in the right and the United States was in the wrong, and that he, Ruhberg, hoped Germany would win, and that Germany was sure to win.
>
> 3. That the best thing that they (meaning the men of registration age and subject to draft) could do when in battle would be to put up their hands and let the Germans take them prisoners.
>
> 4. That one German could lick ten Americans.
>
> 5. That the United States was so slow that Germany would have it whipped, before it, the United States, got ready for war.
>
> 6. That the United States had no business in the war and ought not to have gone in it.

Plaintiff in error is fifty-seven years of age, and was born in Schleswig-Holstein, while that province was a part of Denmark, but is of German parentage, and was educated in Germany, performing his compulsory military service in the German army before emigrating to the United States. He came to the United States in 1884, going to a rancher uncle who

resided in Nevada, and two years later, in 1886, coming to Central Oregon, where he found employment herding sheep, and where he remained either so employed, or tending sheep camps and working in wool warehouses, for a period of approximately fourteen years. Ruhberg became a naturalized citizen of the United States shortly after coming to Oregon, having made his declaration of intention in Nevada in 1884 or 1885. He went to Germany in 1900 for a short visit, and while there married, returning to Central Oregon with his bride a few months later. There plaintiff in error and his wife resided upon his sagebrush homestead until 1904, when he and his wife sold the homestead with their farming implements for the sum of $2,000, and returned to Germany.

The record shows that various causes brought about the second visit to Germany. Ruhberg's wife, who prior to their marriage had always resided in the comparatively large city of Hamburg, had borne no children, and could not become reconciled to the lonely life of a Central Oregon homesteader. His father, a Hamburg merchant, had died, leaving property interests of considerable value, and somewhat involved. A brother of Ruhberg, who had been handling the business and affairs of the father's estate, had also died shortly before, and the mother of plaintiff in error was importuning him to return to Hamburg and assist her

in the settlement of her deceased husband's estate and affairs. This proved a task of some consequence, and operated to defer the return of Ruhberg to the United States until the year 1913, when he returned to Sherman County, after arranging with his wife to follow him shortly thereafter.

Upon his return to Sherman County in 1913, Ruhberg took up a residence in the locality of his former home with one Von Borstel, a friend of many years' standing, and assisted as best he could in his then crippled condition in the operation of two large wheat and stock ranches owned by Von Borstel, while awaiting the arrival of his wife, and pending the purchase by plaintiff in error of a ranch of his own. Before final settlement of the father's estate could be made and the wife embark for America with their share of the estate proceeds, the war broke out. Travel from German ports becoming thereupon dangerous and greatly restricted, she remained in Germany and presumably is still there, but whether alive or dead her husband knows not.

Ruhberg therefore continued in the employment of Von Borstel on the ranch locally known as the "Mackin Place," hauling wheat to the village and shipping point of Kent, working in the harvest fields, caring for the stock, doing kitchen and housework, and strictly attending to his own work and business. It conclusively appears from the record

that from the return of Ruhberg to Sherman County in 1913 until his arrest nearly five years later, he was not outside that county. For days at a time he saw no other person. He sought no new acquaintances, and seldom saw his old ones. He did no visiting about the neighborhood of his employment, and was never found at public gatherings of men, old or young. His walks of life lay in a sparsely settled part of interior Oregon, remote from centers of population, barely touched by modern transportation lines, and hundreds of miles from any of our military cantonments. Those who talked with him during this time either sought him out for that purpose, or met him in the course of his employment.

It likewise appears from the record in this case that in the early part of June of 1917, and apparently before the Espionage Act became a law of this country, William Mitchell came from a field he was plowing to a place where Ruhberg was unloading rocks he had hauled from the Von Borstel fields, for the purpose of obtaining from Ruhberg a drink of water, Mitchell having no water with him. Mitchell states that on this occasion, which was the only time he ever talked with plaintiff in error, the talk drifted to war subjects, and that Ruhberg thereupon said:

> "That this country had no business in the war against Germany, it was not our war, the working people's war, it was the rich man's

war, and that they would be helpless anyway, and that before we could do any good the West front would be taken and the French and English whipped; that it would take ten Americans to stand off one German and that we were wrong in entering the war, as it was not our fight; that the rich men had caused the war, and it was not our war."

Mitchell is positive that he never talked with Ruhberg when Luther Davis was present, as is charged in the indictment. It *conclusively appears* from his testimony that Mitchell was, at the time of this conversation, of the age of thirty-four years; outside the draft; had a wife and four children, the oldest but ten years of age; that solely on account of his family, and for no other reason, he had never thought of enlisting in the military service, and that he *paid no attention whatsoever* to anything Ruhberg had said to him.

The Government witness, Luther Davis, was a renter and farmer of lands located on the road between the Mackin ranch and the wheat warehouse at the station of Kent. He was younger than Mitchell, and at the time of some of his later conversations with Ruhberg had registered for military duty under the Selective Service Act of May 18, 1917, and had received a deferred classification. The wife of the witness Davis had been very friendly with Mrs. Ruhberg during the residence of the latter in the United States, and when Ruhberg stopped at the Davis home enroute to or returning from

Kent, Mrs. Davis would usually make some inquiry concerning Mrs. Ruhberg. Both Mr. and Mrs. Davis state that his inability to get any word from his wife or to her for more than a year, due to stoppage of mails to and from Germany, was a matter concerning which Ruhberg complained bitterly, and which always provoked him to criticism of the methods of the allied countries at war. Davis stated, over objection of counsel for plaintiff in error, that early in the spring of 1917, and prior to the entrance of the United States into the war, he had discussed war topics with Ruhberg, when Ruhberg had said that he

> "could get no letters from his wife in Germany because of the censor, and blamed the English for that; that the English got ammunition from Americans, and Germany couldn't get anything, that we were sending ammunition to kill the Germans with and had no business doing that; that the United States had no business interfering with the allies, and that we never had been neutral; that Germany was a fine country, far superior to the United States; that you had more freedom and could get anything you wanted, whiskey or wines, or anything you wanted there; that you couldn't get anything you wanted here any more; that he had been in the German army about three years, and had been in the Franco-Prussian war; that the training of the German army was far superior to the American army; that he was in the German cavalry training, and told what a fine horse he had, and what fine training he went through; that Germany was perfectly right in sinking the Lusitania; that ships carrying con-

> traband of war with passengers on them who had no more sense than to ride in time of war ought to be sunk; that if this country got into the war, Germans in this country would rebel against this government; that this country was in no shape to fight the German Government; that we were so slow that Germany would have the allies licked before we got ready to fight, and then come to the United States; that Germany was in the right, and she was bound to win, and that the German Government always took the right side to everything; that they never had lost a war and they never would."

Davis also stated that after the United States had entered the war, and in November of 1917, he and Mrs. Davis had gone to the home of Ruhberg at the Mackin ranch for some vegetables Ruhberg had given them, and there saw on the walls of a room of the house a picture of the German Kaiser, and a German flag, and on a table underneath, a small boat model carrying three American flags. On that occasion, according to Davis, Ruhberg spoke

> "about fighting in the Franco-Prussian war and what a fine army Germany had; saying that we had no business in the war, had no call whatever to be into the war; that the moneyed men and men of the shipping interests and men around these big steel factories in the East making munitions were the men that had brought us into the war; that he wouldn't advise any man that didn't have a surplus amount of money to invest in Liberty Bonds, for in a couple of years they would go down, they probably wouldn't be worth 25 per cent under par;

that he would advise me not to enlist, not to get into the army until after I was drafted; that if a bullet didn't kill me I would die of sickness on account of so many dead people, and that Mr. Von Borstel after seeing some American troops in The Dalles, said that they handled a gun like a kid would."

Davis states that at the time of the conversation last mentioned, Ruhberg knew he had registered, and was subject to draft; that the conversations had with Ruhberg prior to the entrance of the United States into the war had caused him to begin to think that Germany was in the right; that the United States was not neutral in sending ammunition to the allies, and that the sinking of the Lusitania was justified. The United States attorney then said:

"Q. Now, what effect did the conversations of Ruhberg have with you subsequent to our entrance into the war?

A. It didn't have much of any, that didn't.

Q. What was the reason of the change?

A. Well, other people talked to me, different people around. I quit visiting Borstels, and other people got talking to me, and I got it out of my head; it put me to thinking."

Answering a question of the court, Davis testified that Ruhberg appeared to be very much in earnest at the time of his last conversation with him about the war, and appeared to try to impress upon Davis what he said.

Davis further stated that the flags spoken of as seen by him on the walls of the Mackin house were small cotton flags which may have come in boxes of cigarettes, that Ruhberg had never claimed them or called the attention of Davis to them in any way, but had stated that a boy named Wiley had brought them there and given them to one of the Von Borstel boys; that he also saw at the same time and place, and on the bedroom door, an American flag of about the same size as the one of Germany; that Ruhberg had never advised him to desert in event he had to go into the service; and speaking of the Liberty loans had told Davis of financial losses the Ruhberg family had sustained through purchase by his father many years ago of German Franco-Prussian war bonds, which had depreciated 33 1-3 per cent.

Davis then testified as follows:

"Q. Now, these statements that he made to you that you speak of, after we came into the war, they didn't influence you in any way, or deter you from enlistment, did they?

A. No, sir; they didn't keep me from enlisting, but still it made me feel bad.

Q. You hadn't intended or expected to enlist, had you?

A. No, sir.

Q. Nothing he said influenced you in the matter, or changed your intentions in any way as regards going into the service?

A. Well, if I hadn't been married, it probably would have.

Q. But you were married?

A. I was, yes.

Q. And had no intention of going until you had to?

A. No, sir.

Q. The only reason you didn't go was because of your wife and your baby?

A. Yes, sir.

Q. How old is the baby?

A. Eleven months old."

Davis was likewise positive he had never talked with Ruhberg in the presence of Mitchell, as charged in the indictment. The witness, Mrs. Davis, largely corroborated the testimony of her husband, concerning statements made by Ruhberg at their home, and the circumstances under which they were made, stating that Ruhberg's chief complaint was because he had been unable to hear from his wife in Germany, and to get mail from or to her; concluding with the statement that her husband, Luther, had made no effort at any time to enlist.

It is this testimony, and this alone, which is relied upon to support the judgment of conviction of Count IV. At the close of the Government's case a motion was made for a directed verdict of "not guilty" upon this count for the reason that no evidence had been presented showing, or from which the jury might find, any injury to the recruiting

or enlistment service of the United States or to the United States by reason of any statements or acts of Ruhberg; by reason of the variance between the charge and the proof—it appearing from the proof that Ruhberg had at no one time discussed war topics in the presence of both Mitchell and Davis—and for the further reason that any such statements made by Ruhberg to Mitchell were made prior to the enactment and approval of the Espionage Act, and before it became a law of the United States.

The motion was overruled by the court. At the close of the defendant's case this motion was renewed, overruled, and exception allowed. The case was given to the jury without any proof whatsoever being offered of an *actual obstruction* by Ruhberg of the recruiting or enlistment service of the United States; without any proof whatsoever of a resulting or consequent *injury* to that service, or to the United States, as charged in the count; and in the face of uncontradicted testimony of *every* witness for the Government that any statements made by Ruhberg had *not* so operated. Instructions requested by plaintiff in error for a directed verdict of "not guilty" upon this count were also refused and exception taken and allowed.

After the verdict of conviction as concerns Count IV was returned, motions for a new trial and in arrest of judgment were filed on behalf of Ruhberg

and overruled, and sentence of fifteen months' imprisonment in the McNeil Island penitentiary and fine of $2,000 imposed. To right the imposition of this judgment, writ of error has been sued out in this honorable court.

Taking the evidence against plaintiff in error as uncontradicted, and wholly ignoring the defense offered, it presents at the best and in the fullest aspects, no more than *unsuccessful attempts* on the part of Ruhberg to obstruct the recruiting and enlistment service of the United States, which is *not* made a crime by the provisions of the Espionage Act, or any other federal law; and wholly without *resulting injury* to the recruiting or enlistment service of the United States, or to the United States, which *is* by Congress made an element of the offense denounced by Section 3 of the Espionage Act; which *is* charged in the indictment; and of which proof beyond reasonable doubt *is required.*

ASSIGNMENTS OF ERROR.

I.

Error of the court in overruling the motion of defendant for a directed verdict of not guilty for failure of proof of the offense charged in Count IV of the indictment.

II.

Error of the court in failing and refusing to direct a verdict of not guilty for failure of proof of the offense charged in Count IV of the indictment.

III.

Error of the court in overruling the motion of defendant for a directed verdict of not guilty of the offense charged in Count IV of the indictment by reason of variance between the charge made in said count and the evidence and proof submitted to sustain such charge against defendant.

IV.

Error of the court in failing and refusing to direct a verdict of not guilty of the offense charged in Count IV of the indictment by reason of variance between the charge made in said count and the evidence and proof submitted to sustain such charge against defendant.

V.

Error of the court in refusing to give the jury the following instruction:

"Counts II and IV of the indictment, while

charging distinct violations by the defendant of the statute known as the Espionage Act, in that the statements alleged to have been made by the defendant Ruhberg, and set forth in these counts of the indictment, were made at different times, and to different persons, are yet largely identical in character. They are both drawn under the same provision of the statute, a provision which makes it unlawful for any person while the United States is at war with any foreign power, to wilfully obstruct the recruiting or enlistment service of the United States, to the injury of the service, or to the injury of the United States. You will therefore note that there are three elements which must be proven before a verdict of guilty may be rendered upon either of these counts of the indictment: First, there must exist the state of war mentioned; second, there must be a wilfull obstruction of recruiting or enlistment; third, there must result an injury to the recruiting or enlistment service, or to the United States. I instruct you, gentlemen of the jury, that if the Government has failed to prove to your satisfaction, and beyond a reasonable doubt, any one of these three elements of the offense charged in Counts II and IV of the indictment, your verdict must necessarily be as to these counts a verdict of not guilty. And since the Government has not shown that the statements charged in Counts II and IV of the indictment to have been made by the defendant Ruhberg did in fact result in any injury whatsoever, either to the recruiting or enlistment service of the United States, or to the United States, your verdict upon Counts II and IV of the indictment must be verdicts of not guilty."

VI.

Error of the court in refusing to give the jury the following instruction:

> "I instruct you, gentlemen of the jury, that before you can find the defendant guilty of the charge preferred against him in the fourth count of the indictment, you must find that the statements charged in that count to have been made by him, or some of them, were made substantially in the form alleged, in the presence of both Luther Davis and William Mitchell, and since it conclusively appears by the testimony of both the Government and the defense that no such statements or any statements were made by the defendant since the Espionage Act became a law, in the presence of these two men, you must find a verdict of not guilty upon this count of the indictment. It is incumbent upon you to try this defendant solely upon those charges preferred against him in this indictment, and if at times other than those mentioned in the indictment he has violated some law of the United States, he cannot in this trial be tried or convicted of such other offenses."

VII.

Error of the court in overruling the objection of the defendant to and receiving in evidence and in permitting the witness Luther Davis to testify to statements made to him by defendant, and conversations had between him and defendant, upon subjects relating to the war, and had and made prior to the entry of the United States into the war.

VIII.

Error of the court in overruling the motion of the defendant for arrest of judgment by reason of the failure of Count IV of the indictment to state facts sufficient to constitute an offense against the United States.

IX.

Error of the court in overruling the motion of defendant for an order setting aside the verdict and judgment of conviction and granting defendant a new trial.

BRIEF AND ARGUMENT.

I.

Error of the court in overruling the motion of defendant for a directed verdict of not guilty for failure of proof of the offense charged in Count IV of the indictment.

II.

Error of the court in failing and refusing to direct a verdict of not guilty for failure of proof of the offense charged in Count IV of the indictment.

V.

Error of the court in refusing to give the jury the following instruction:

> "Counts II and IV of the indictment, while charging distinct violations by the defendant of the statute known as the Espionage Act, in that the statements alleged to have been made by the defendant Ruhberg, and set forth in these counts of the indictment, were made at different times, and to different persons, are yet largely identical in character. They are both drawn under the same provision of the statute, a provision which makes it unlawful for any person while the United States is at war with any foreign power, to willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service, or to the injury of the United States. You will therefore note that there are three elements which must be proven before a verdict of giulty may be rendered upon either of these counts of the indictment. First, there must exist the state of war mentioned; second, there must be a willful obstruction of recruiting or en-

listment; third, there must result an injury to the recruiting or enlistment service, or to the United States. I instruct you, gentlemen of the jury, that if the Government has failed to prove to your satisfaction, and beyond a reasonable doubt, any one of these three elements of the offense charged in Counts II and IV of the indictment, your verdict must necessarily be as to these counts a verdict of not guilty. And since the Government has not shown that the statements charged in Counts II and IV of the indictment to have been made by the defendant Ruhberg did in fact result in any injury whatsoever, either to the recruiting or enlistment service of the Uinted States, or to the United States, your verdict upon Counts II and IV of the indictment must be verdicts of not guilty."

The first, second and fifth errors assigned go to the same questions, i. e., the necessity, before conviction may be had of the offense of obstructing the recruiting or enlistment service of the United States, of proof of an *accomplished and actual obstruction* as distinguished from an *attempt to obstruct;* and *proof of injury* thereby to the service or to the United States. That the offense of obstructing the recruiting and enlistment service does not include attempts to so do is elementary. As is said by Judge Wharton, there can by common law be no conviction of *attempt* on a count for *consummated crime*: Wharton's Criminal Law, Sec. 237; Wharton's Criminal P. & P., Sec. 261. And such is the holding of Judge Bourquin in the recent and squarely parallel case of *United States v. Hall*

(Dist. Court, District of Montana), 248 Fed. Rep. 150-153, where, in granting a motion for a directed verdict of not guilty, the court says:

> "Nor does the evidence sustain the charge of 'wilfully obstructing the recruiting or enlistment service of the United States, to the injury of the service of the United States.' To sustain the charge, *actual obstruction and injury must be proven*, not mere *attempts to obstruct*. The Espionage Act does not create the crime of attempting to obstruct, but only the crime of actual obstruction, and when causing injury to the service. Whenever Congress intended that attempted obstructions should be a crime, it plainly said so, as may be seen in the statute making it a crime to attempt to obstruct the due administration of justice: Section 135, Penal Code."

Were this *not true*, it is difficult to understand why the same Congress which enacted the law under which this prosecution is brought, so amended the act less than a year thereafter as to *specifically include* therein *attempts to obstruct*. The amendatory act was approved May 18, 1918 (Fed. Rep. Advance Sheets, Vol. 249, No. 4) and follows; that portion of the original Section 3, which was carried into the amended section appearing in black, and the new matter added being shown in red:

> An Act to amend Section 3, Title I of the act entitled "An Act to punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish

espionage, and better to enforce the criminal laws of the United States, and for other purposes," approved June 15, 1917, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:

That Section 3 of Title I of the act entitled "An Act to punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes," approved June 15, 1917, be, and the same is hereby, amended so as to read as follows:

"Sec. 3. Whoever, when the United States is at war, shall wilfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States, or to promote the success of its enemies, or shall wilfully make or convey false reports or false statements, or say or do anything except by way of bona fide and not disloyal advice to an investor or investors, with intent to obstruct the sale by the United States of bonds or other securities of the United States or the making of loans by or to the United States, and whoever, when the United States is at war, shall wilfully cause,

or attempt to cause, or incite or attempt to incite, insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall wilfully obstruct or attempt to obstruct the recruiting or enlistment service of the United States, (*) and whoever, when the United States is at war, shall wilfully utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language about the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States, or the flag of the United States, or the uniform of the Army or Navy of the United States, or any language intended to bring the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States, or the flag of the United States, or the uniform of the Army or Navy of the United States into contempt, scorn, contumely, or disrepute, or shall wilfully utter, print, write, or publish any language intended to incite, provoke, or encourage resistance to the United States, or to promote the cause of its enemies, or shall wilfully display the flag of any foreign enemy, or shall wilfully by utterance, writing, printing, publication, or language spoken, urge, incite, or ad-

*"to the injury of the service, or of the United States" *eliminated entirely* in amended Act.

vocate any curtailment of production in this country of any thing or things, product or products, necessary or essential to the prosecution of the war in which the United States may be engaged, with intent by such curtailment to cripple or hinder the United States in the prosecution of the war, and whoever shall wilfully advocate, teach, defend, or suggest the doing of any of the acts or things in this section enumerated, and whoever shall by word or act support or favor the cause of any country with which the United States is at war or by word or act oppose the cause of the United States therein, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both: Provided, that any employee or official of the United States Government who commits any disloyal act or utters any unpatriotic or disloyal language, or who, in an abusive and violent manner criticizes the Army or Navy or the flag of the United States shall be at once dismissed from the service. Any such employee shall be dismissed by the head of the department in which the employee may be engaged, and any such official shall be dismissed by the authority having power to appoint a successor to the dismissed official." Approved May 16, 1918.

Because of the recent enactment of the section involved in this case, counsel for plaintiff in error have been able to find but few reported cases bearing upon the question of what constitutes an obstruction to the recruiting or enlistment service. It is of interest, however, to note that in the case of *United States v. Carroll*, which was a contempt proceeding heard by District Judge Wolverton, sitting in the District Court of the District of Montana, reported at 147 Fed. Rep. 947, and in which the defendant Carroll was proceeded against under the provisions of Section 725, U. S. R. S. for obstructing the administration of justice, it was held that

> "The act complained of must have the *direct effect within itself to obstruct or impede* the administration of justice (147 Fed. Rep. 953)";

and that

> "A bare attempt, without success, to induce a third person to do what he could to influence jurors in a pending case in a federal court, did not obstruct the administration of justice, so as to constitute a contempt, punishable under Rev. Stat., Sec. 725, under the rule that, to constitute such contempt, the act done by the accused must naturally and directly tend to such obstruction" (Syllabus),

following the holding of Judge Krekel in the case of *United States v. Bittinger*, 24 Fed. Cas. 1149, and the later case of *United States v. Seeley*, 27 Fed. Cas. 1010. In the latter case it is said:

> "To 'obstruct,' independent of the acceptation the word has obtained in the criminal law, would seem to stand *ex ri termini* a direct and positive interposition, which prevented, or tended to prevent, the action of the officer or court in respect to a matter then to be proceeded in. 'Impede' must necessarily bear a similar import, and, if there be any discrimination between the two terms, it can only be that the same direct and positive interference may, without amounting to a complete obstruction, become an impediment to the action intended to be intercepted. The intention of the Legislature to give these terms an application only to direct acts of violence or menace is inferable from the construction that the endeavor is made equally criminal with the entire completion of the purpose. An endeavor to obstruct or impede, etc., by threats or force, would necessarily imply the effort to put forth some act, which in its natural, if not necessary, consequence, must be attended *with an obstruction*, and with a *forced and compelled interruption of further progress* in the administration of justice."

In the trial of the Ruhberg case the court, in defining the word "obstruct," as it is used in Section 3 of the act approved June 15, 1917, stated to the jury that it meant "to hinder, to impede, to embarrass, to retard, to check, to slacken, to prevent in whole or in part," and as used in the indictment did not mean to wholly impede or to block the way. This definition accords with that generally adopted by the courts of the various districts and circuits, and to so much of the instruction we take no exception. The case of the *United States against Ruh-*

berg, however, taken in its strongest aspect against him, may best be illustrated by the act of one dislodging a boulder from the side of a canyon, which, instead of finding lodgment in the flowing steam beneath, stops before reaching the bed of the stream, and lays high and dry above the water course. It does not *hinder* the flow of the stream. It does not *impede*, nor *embarrass*, nor *retard*, nor *check*, nor *slacken*, nor *block the way*, nor *prevent* in whole or in part the onward movement of the flowing water. It does not *obstruct*, because at the most, it is but an *unsuccessful attempt at obstruction*.

From the foregoing, and guided by the common dictates of reason, it would seem idle to contend that anything but convincing proof of an *actual and accomplished obstruction* of the recruiting and enlistment service of the United States, as distinguished from proof of an *attempt to obstruct*, will serve to support the conviction of the plaintiff in error of obstructing that service. It is *not enough* to say that the jury has found that plaintiff in error did in fact so obstruct the service. Such a finding *must be supported by evidence*, and none can be found in the record, because no such evidence was adduced in the trial.

The case of *United States v. Hall*, 248 Fed. Rep. 150, hereinbefore cited, and the only case to be found in the Federal Reporter where the questions here presented were squarely passed upon, is as like

the *Ruhberg* case as two peas. The defendant Hall, "at divers times, in the presence of sundry persons, some of whom had registered for the draft, declared that he would flee to avoid going to the war, that Germany would whip the United States, and he hoped so, that the President was a Wall Street tool, using the United States forces in the war because he was a British tool, that the President was the crookedest ——— ever President, that he was the richest man in the United States, that the President brought us into the war by British dictation, that Germany had right to sink ships and kill Americans without warning, and that the United States was fighting for Wall Street millionaires and to protect Morgan's interests in England. . . . It appears the declarations were made at a Montana village of some sixty people, sixty miles from the railway, and none of the armies or navies within hundreds of miles, so far as appears. The declarations were oral; some in badinage with the landlady in a hotel kitchen; some at a picnic; some on the street; some in hot and furious saloon arguments." The Ruhberg record shows no more objectionable statements made by plaintiff in error than those of Hall, *if* they are *as objectionable;* and the Montana court having reached the conclusion, however reluctantly, that the Espionage Act construed in the Hall case meant *only exactly what it said*, could take no other course but that of directing a verdict

for Hall of not guilty. And if the Espionage Act of June 15, 1917, *does* mean what it says, and that only, and if Judge Bourquin *is correct* in so concluding, then it would seem that the *real* misfortune of Julius Ruhberg, for which he must pay by fine, penitentiary imprisonment, loss of citizenship, and probable internment after the expiration of his penitentiary sentence, should he live through that period, is the misfortune of having been indicted and tried in the District of *Oregon*, and not in the District of *Montana*.

The necessity of establishment by convincing evidence of the fact of *injury* to the enlistment or recruiting service of the United States was earnestly urged upon the trial court at the conclusion of the trial, in connection with the motion of plaintiff in error for a directed verdict, and thereafter in his motion for a new trial. It is hard to believe that there should be in the minds of this court any doubt that "injury of the service or of the United States" is one of the three elements of the offense as defined by the statute, and as charged in Count IV of the indictment, and *must* be proved and sustained by the same measure of evidence required to establish other necessary elements of this statutory crime. Furthermore, it is submitted that the question of injury is one of *fact*, and *for the jury*, and not, as assumed by the trial court, a question of

law to be determined by the court. Had there been *any evidence* offered in the course of the trial of injury to the recruiting or enlistment service, either directly resulting or even remotely chargeable to any acts or words of plaintiff in error, that question of injury might and should have been given to the jury under proper instructions. But in the face of the avowal of *every witness* produced against plaintiff in error that *no injury* had resulted, and the absolute failure of the Government to offer any proof of injury whatsoever, the court was clearly in error in refusing to give the instruction requested by Ruhberg, and set out herein as the fifth assignment of error of this plaintiff.

The words "to the injury of the service or of the United States" appearing in the third section of the Espionage Act as approved June 15, 1917, are conspicuously absent from this section of the act as it is amended. The original and the amended section were enacted by the same Congress, no congressional elections intervening between the dates of passage and approval. The clause meant something, or it would not originally have been inserted. It meant something, or it would not subsequently have been eliminated. If it meant anything, it meant *exactly what it said.* It is repugnant to no other provision of the section, nor does it appear in terms complex and difficult of understanding. The usual and universally accepted rules of statutory construction

require this court to give it effect, and it cannot be given effect, and the judgment of conviction be allowed to stand. Had the cause been a civil one, and proof of damage or injury necessary to a recovery by plaintiff, no court in the land would have permitted it to go to a jury upon a record so wholly empty of *proof of injury* as is the record in this cause. In a criminal case, requiring a strict construction of the statute against the plaintiff; strict proof of every averment of the pleading; and a measure of proof infinitely greater than that required in civil causes, how can it be said upon the record in this case that plaintiff in error obstructed the recruiting and enlistment service of the United States *to the injury of that service and of the United States?*

III.

Error of the court in overruling the motion of defendant for a directed verdict of not guilty of the offense charged in Count IV of the indictment by reason of variance between the charge made in said count and the evidence and proof submitted to sustain such charge against defendant.

IV.

Error of the court in failing and refusing to direct a verdict of not guilty of the offense charged in Count IV of the indictment by reason of variance between the charge made in said count and the evidence and proof submitted to sustain such charge against defendant.

VI.

Error of the Court in refusing to give the jury the following instruction:

> "I instruct you, gentlemen of the jury, that before you can find the defendant guilty of the charge preferred against him in the fourth count of the indictment, you must find that the statements charged in that count to have been made by him, or some of them, were made substantially in the form alleged, in the presence of both Luther Davis and William Mitchell, and since it conclusively appears by the testimony of both the Government and the defense that no such statements or any statements were made by the defendant since the Espionage Act became a law, in the presence of these two men, you must find a verdict of not guilty upon this count of the in-

dictment. It is incumbent upon you to try this defendant solely upon those charges preferred against him in this indictment, and if at times other than those mentioned in the indictment he has violated some law of the United States, he cannot in this trial be tried or convicted of such other offenses."

Count IV of the indictment must be read as charging Ruhberg with making the statement therein set forth to both Mitchell and Davis at the same time and place, or if a continuing offense, at the same times and places. In no other way can it be saved from the fatal error of duplicity. It was so considered upon the trial, and, upon the testimony of the witness Mitchell (Transcript, 64) and the witness Davis (Transcript, 146) that neither of these men had ever at any time discussed war questions or anything else with plaintiff in error Ruhberg in the presence of the other, counsel for plaintiff in error insisted and still insists that the record shows a fatal variance.

The defendant in a criminal cause, where conviction carries severe penalties, is entitled to be advised of the charges made against him by a pleading clearly, accurately and concisely stating to him the time, the place and the manner in which he has violated the law. If Ruhberg or his counsel had been assured before the trial by Mitchell or Davis or both of them that he, Ruhberg, had on no occasion between the dates named in Count IV of the

indictment made to or in their hearing the statements therein charged, would not they be justified in assuming, and proceeding to trial upon the theory, that the indictment referred to and charged some other and different offense than that for which he was really tried? Or that, in the very statements of both Davis and Mitchell, he had a good defense to that count of the indictment? The Government machinery for the investigation of apparent law violations is far-reaching and all-powerful. Some months intervened between the arrest of Ruhberg and the return of the indictment against him. There was ample time and every facility for a full and exhaustive investigation, which would have enabled the prosecuting officers of the Government to have advised this man definitely, clearly and concisely of the charge upon which he was to face trial. There is no justification in fact or in law for a *blanket* indictment such as is found in Count IV, drawn, like a mantle of charity, to cover a multitude of unproven sins; evidently drafted to meet any contingency arising in the trial; and *wholly failing* to accurately or definitely advise the accused of the time, place or nature of the acts concerning which proof was offered. It is as unfair to convict this plaintiff in error of a charge wholly different from that made in the indictment, as to convict him of an offense which he never committed, and it is submitted that the denial by the court of the re-

quested instruction of plaintiff in error of a verdict of not guilty, by reason of variance between the *allegata* and the *probata,* constitutes reversible error.

VII.

Error of the court in overruling the objection of the defendant to and receiving in evidence and in permitting the witness Luther Davis to testify to statements made to him by defendant, and conversations had between him and defendant, upon subjects relating to the war, and had and made prior to the entry of the United States into the war.

Over the objection of counsel for plaintiff in error, and exception allowed and taken, the Government witness, Luther Davis, was permitted to testify to conversations had with and statements made to him by plaintiff in error early in the spring of 1917, and prior to a declaration of war between the United States and Germany. He testified that on this occasion Ruhberg had said that he

> "could get no letters from his wife in Germany because of the censor, and blamed the English for that; that the English got ammunition from Americans, and Germany couldn't get anything, that we were sending ammunition to kill the Germans with and had no business doing that; that the United States had no business interfering with the allies, and that we never had been neutral; that Germany was a fine country, far superior to the United States; that you had more freedom and could get anything you wanted, whiskey or wines, or anything you wanted there; that you couldn't get anything you wanted here any more; that he had been in the German army about three years, and had been in the Franco-Prussian war; that the training of the German army was far superior

to the American army; that he was in the German cavalry training, and told what a fine horse he had, and what fine training he went through; that Germany was perfectly right in sinking the Lusitania; that ships carrying contraband of war with passengers on them who had no more sense than to ride in time of war, ought to be sunk; that if this country got into the war, Germans in this country would rebel against this Government; that this country was in no shape to fight the German government; that we were so slow that Germany would have the allies licked before we got ready to fight, and then come to the United States; that Germany was in the right, and she was bound to win, and that the German government always took the right side to everything; that they never had lost a war and they never would."

These statements charged by Davis to have been made by plaintiff in error were, if made at all, merely expressions of opinion upon questions being generally discussed by our press and public at that time. It was no offense at that time, when our nation was maintaining a position of neutrality between the fighting nations of Europe, to either entertain or express a sympathy with any one of the belligerents. For years before the entry into the war of the United States, the larger nations at war had been spending millions of dollars in campaigns of advertisement and education for no other purpose than to secure the sympathy and moral support, and the good wishes of the people of neutral nations, particularly the American people. The

earlier reports made public by the German nation of its war movements were invariably accurate, and not knowing then, as we knew later, and know now, the depths of duplicity and untruth which were sounded by those having in hand for the German nation its campaign for the support by the people of this country of its war aims and purposes, it may readily be believed that any of these statements made by plaintiff in error were made in a sincere and honest conviction of their truth, and without criminal or wrongful intent. Our armies are full today of splendid fighting men of German extraction, who are doing their utmost to preserve to the world rights of liberty and equality, whose loyalty is unquestioned, and yet whose sympathies, before the entry of the United States into the war, were unquestionably with the German arms. The plaintiff in error was born on the borders of Germany, of German parents, received his education in German schools, and had military training in the German army. Furthermore, he had had relatives in the German army, fighting against France and England on the Western front, and at the time of the trial testified that one of his nephews was then a war prisoner in a British camp. As between Germany and any nation other than the United States, it would be strange to find or to expect to find his sympathies elsewhere than with Germany; or to find him anything but humanly ready to believe the

lies of German publicity agents, sent broadcast over the world in an attempt to justify the sinking of ships carrying defenseless women and children, and the other and many defenseless and unlawful war measures adopted by that nation.

Any statements made by Ruhberg to the witness Davis early in the spring of 1917, and prior to the entry of the United States into the war, could not have been made with the unlawful purpose denounced by Section 3 of the Espionage Act, because at that time obstruction of the recruiting or enlistment service of the United States was not an offense. Such statements as are charged by Davis to have been made by Ruhberg in the early spring of 1917 could not but operate to greatly prejudice the trial jury against him. They were, if admissible in evidence at all, admissible for but one purpose and upon but one theory, to-wit, to show intent of plaintiff in error as concerns subsequent acts and statements. Because of the fact that statements made at the time and under the circumstances these are charged to have been made, did not, and ordinarily could not truly tpyify the state of mind of Ruhberg after his adopted country became involved in the European war, it is contended by counsel for plaintiff in error that this evidence should not have been admitted and having been admitted, and being of a character highly prejudicial, constitutes reversible error. Ruhberg testi-

fies (Transcript, 125-126-131-132-133) that only by degrees did he become convinced that Germany was wrong, and the United States justified in entering the war, and this court must know in its broad knowledge of human nature and affairs, that he is but one of untold thousands of German-born American citizens who regretted the entry of the United States into a war against Germany, but who today are better and more loyal American citizens than many of our native-born, having no blood ties with, and held by no bonds of sympathy to enemy countries.

VIII.

Error of the court in overruling the motion of the defendant for arrest of judgment by reason of the failure of Court IV of the indictment to state facts sufficient to constitute an offense against the United States.

After the verdict of conviction, and prior to judgment and sentence, plaintiff in error filed in the trial court a motion for order in arrest of judgment, for the reason that Count IV of the indictment fails to state facts sufficient to constitute an offense against the United States, in that, first, that count of the indictment wholly fails to allege the intended recruiting or enlistment in the military or naval forces of the United States of William Mitchell or Luther Davis, or any other person whomsoever, and second, that said count of the indictment wholly fails to allege or charge plaintiff in error with knowledge or notice of the proposed or intended enlistment or recruiting in the military or naval forces of the United States of William Mitchell or Luther Davis, or any other person whomsoever.

The motion of plaintiff in error for arrest of judgment was overruled by the trial court, and exception taken and allowed.

If what is declared by the United States Supreme Court in the case of *Pettibone v. United*

States, 148 U. S. 197, 206, to be the law governing indictments charging *obstruction of* the due administration of *justice* is applicable to charges of *obstruction of* the *recruiting or enlistment* service, the indictment is fatally defective. It appears from the report of this case that Pettibone and others were indicted for conspiracy to obstruct the administration of justice in a court of the United States, and upon trial, convicted and sentenced to imprisonment. The indictment in the *Pettibone* case failed to allege the pendency of the proceeding in the federal court with the obstruction of which Pettibone was charged, and likewise lacked any averment of notice or knowledge on the part of Pettibone of the pendency of any such proceeding. In the opinion of the court, written by Mr. Chief Justice Fuller, it is said (206):

> "It seems clear that an indictment against a person for corruptly or by threats or force endeavoring to influence, intimidate or impede a witness or officer in a court of the United States in the discharge of his duty, must charge knowledge or notice, or set out facts that show knowledge or notice, on the part of the accused that the witness or officer was such. And the reason is no less strong for holding that a person is not sufficiently charged with obstructing or impeding the due administration of justice in a court, unless it appears that he knew or had notice that justice was being administered in such court."

There is no allegation in Count IV of the indictment that either Mitchell or Davis, or any other person referred to therein, were being recruited or enlisted by the United States for military service. There is no charge made in the indictment that the accused had knowledge of the intended recruiting or enlistment of these persons. It will not be seriously contended that *intent* is not an element of the offense with which Ruhberg is charged, in view of the general holding of the courts that the term "wilfully," when used in a criminal statute, means more than "voluntarily," and implies and imports a *criminal intent* to purposely do a wrongful act, and in view of the allegation of intent in the indictment. Upon reason, the same requirements obtaining in an indictment charging obstruction of the due administration of justice in a court of the United States apply with equal force to an indictment charging a willful obstruction of the recruiting and enlistment service of the United States. We therefore submit that the case of *Pettibone v. United States* is in point, and is controlling, and this being true, the conviction must be reversed and Count IV of the indictment quashed.

Upon this point the case of *United States v. McLeod*, Dist. Court, District of Alabama, 119 Fed. 416-418, is of interest. This likewise was a charge of obstructing the administration of justice, and in

sustaining the demurrer to the indictment it is held that

> "Justice can be obstructed or influenced only by obstructing or impeding *those who seek justice* in a court, or those who have duties or powers in administering justice therein."

Neither Davis nor Mitchell were *seeking enlistment* in the military forces, nor was the United States particularly seeking through its officers to recruit them. The indictment carries no allegation to that effect, nor any allegation of notice or knowledge of such fact on the part of the accused; and if it did, the record discloses no *proof* of such conditions.

IX.

Error of the court in overruling the motion of defendant for an order setting aside the verdict and judgment of conviction and granting defendant a new trial.

We are aware of the fact that motions for a new trial are addressed to the discretion of the trial court, and that no review may be had of a denial thereof, except in cases of patent abuse of that discretion. The questions of law herein presented to this honorable court were fully presented to, and the rights of plaintiff in error urged upon the trial court at the time the motions for a new trial and in arrest were heard. We now contend that the trial court, being fully advised of the errors permitted and committed in the trial, and refusing to exercise his discretionary powers and grant to plaintiff in error a new trial, has grossly abused that discretion; and this being so, his action is properly before this Appellate Court for review.

The re-assembly of the errors appearing in the record of the Ruhberg trial, and discussed in the foregoing pages, with a re-argument thereof, will serve no useful purpose. Let it suffice to say that from the record in this cause it conclusively appears that plaintiff in error has been convicted of a crime he did not commit. He has been convicted of obstructing something which it is conclusively shown was not obstructed. He is convicted of

causing an injury which is not proven by so much as a shadow of evidence of injury. He was tried at a time when public opinion was aroused to the point of demanding conviction of everything German; when the very name of Germany was synonymous with crime. His offense, if one was committed, was that of entertaining or expressing opinions upon questions of national and foreign policy which did not conform with those of his neighbors. It may have been a moral crime, or even a political crime, but it was not a crime by force of statute, and the right to punish for it lies not in the federal courts. He has not gone about seeking out our present or prospective soldiers, preaching to them the principles of sedition or disloyalty. He is not a stealthy frequenter of our training camps and cantonments. During all his years in the United States, he has been found only in those places where his lowly labors of shepherd and farmer have properly taken him. He has not gone about burning our wheat fields, wrecking our industrial plants, furthering by destructive acts the war program and policies of our enemies. He is not an anarchist. He is not an I. W. W. He is not a German spy, and he has not violated our espionage laws. He is simply what the record shows him, an old man whose entire life time has been spent with his herds and flocks in mountain ranges, in sage brush, in wheat fields; an old man whose only offense was that he talked too much; who had trouble in Ger-

many because he had become a free thinking American citizen; who, upon returning to the United States to escape the evils of Prussianism, has by the same methods of invidious comparison, and humanly natural, if ill advised, boastings of the personal rights enjoyed by residents of his mother country, and pride expressed in the prowess of the armies of which he was once a unit, brought upon himself the persecution of the authorities of the land of his adoption.

He is an old man. His honesty and good conduct is vouched for by some of the best citizens of his community. The rigors of winters spent in the mountain fastnesses of Central Oregon sheep camps have laid heavy toll upon him. The snows and cold, the physical hardships and discomforts which are necessarily incident to the paths of endeavor he chose to tread have left him broken in health. He does not know today if his wife is alive or dead. He faces the almost certain prospect of finding his life's savings, with what he should have received from his father's estate, confiscated by the German government because of his American citizenship. He has gone through two costly trials, which, with his other troubles, have left him broken in spirit. And because he preferred the United States to his mother country, and yet could not wholly forget the past, only his appeal to this honorable court stands between him and the swinging gates of the peniten-

tiary. He is not invoking a strained or technical construction of the law. He asks of this court simply that he be not convicted of and punished for an offense he is not shown to have committed. He is asking of this court only that protection of the law which, as is said by Mr. Justice Field in the case of *Wong Wing v. United States*, 163 U. S. 242-243, is the right of every man, rich or poor, citizen or alien, white or yellow, who shall be domiciled within our borders. He is asking justice; no more; no less; that fair and impartial hearing of which the great French Cardinal, Richelieu, so nobly boasted had been by him denied to no man. "For fifteen years," such were his words, "while in these hands dwelt empire, the humblest craftsman, the obscurest vassal, the very lepers shrinking from the sun, though loathed by charity, might ask for justice."

With the sincere belief that the appeal of plaintiff in error to this court will not be for him a vain and idle proceeding, this brief is

Respectfully submitted,

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(In all extracts or quotations from reported cases the italics are presumably ours.)